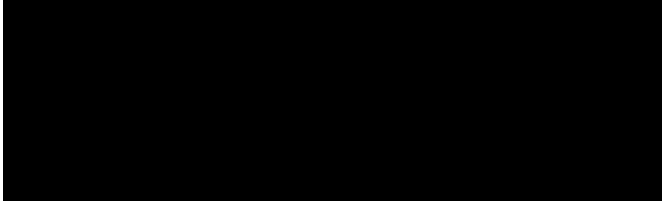




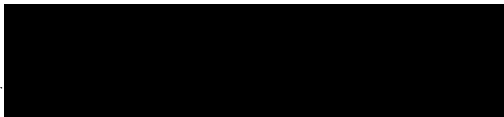
U.S. Citizenship
and Immigration
Services

D-7



FILE: SRC 03 056 50018 Office: TEXAS SERVICE CENTER Date: JUN 23 2004

IN RE: Petitioner:
Beneficiary:




PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner claims to be a subsidiary of Sysentec, Ltda., located in Colombia, and states that it is a distributor of Canon film and printing products. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president and general manager for an additional two years at a salary of \$27,000 per year. The director determined that the petitioner failed to establish that the beneficiary's proposed employment in the United States would be primarily managerial or executive. On appeal, the petitioner disputes the director's findings and submits a brief in support of its assertions.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

At issue in this proceeding is whether the petitioner has established that the beneficiary would be employed primarily in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the petition, the petitioner provided the following description of the beneficiary's job duties:

[The beneficiary] has been responsible for planning, organizing, supervising, controlling and directing the overall operation of the company and establishing the marketing, administrative and technical systems, budget planning and supervising all activities of the company, recruit, hire, train, promote and terminate his staff, directs and coordinates activities of workers engaged in conducting credit investigations and collecting delinquent accounts of customers, plans, directs, and coordinates risk and insurance programs of establishment to control risks and losses; implement institution policies, procedures, and practices concerning granting or extending lines of credit and loans; prepares financial and regulatory reports required by law, regulations, and board of directors; prepares operational and risk reports for management analysis; establishes procedures for custody and control of assets, records, loan collateral, and securities to ensure safekeeping; evaluates effectiveness of current collection policies and procedures; directs insurance negotiations, selects insurance brokers and carriers, and places

insurance; evaluates data pertaining to costs to plan budget; reviews collection reports to ascertain status of collections and balances outstanding; establishes credit limitations on customer account; examines, evaluates, and processes loan applications; submits delinquent accounts to attorney or outside agency for collection. [The beneficiary] evaluates the performance of executives for compliance with established policies and objectives of the company. [sic]

In response to the director's request for additional evidence, the petitioner submitted a copy of an organizational chart identifying the beneficiary as the company's president and general manager. The chart also identifies an outside accounting firm, an account executive, a comptroller, and an import and export coordinator, all of whom are under the beneficiary's direct supervision.

The director denied the petition concluding that with only three employees assisting him the beneficiary would not be primarily performing managerial or executive duties.

On appeal, the petitioner states that the position titles it listed on its original organizational chart do not reflect the position titles commonly used in the industry. As such, the petitioner provided revised position titles for its employees and each employee's list of job duties. The following additional list of job duties was provided for the beneficiary:

- Oversee the sales, marketing, operations and profitability of your assigned center.
- Hiring/training new employees, ensuring optimal client satisfaction.
- Setting profitability goals and selling our product lines.
- Setting measurable business goals and objectives.
- Preparing annual budgets which are reviewed quarterly, recommending capital expenditures, coordinating marketing and leasing activities for property portfolios.
- Implementing departmental policies and procedures, and supervising staff in their respective units.
- Responsible for setting and implementing financial business management, and marketing strategies as appropriate.
- Monitor sales and gross margin results of each territory and grow existing accounts and capture new business.
- Increase market share of all units through aggressive sales planning.
- Increase inventory turns and reduce inventory shrinkage.
- Implement corrections and follow-up actions to internal audits.

The petitioner also claims that due to the increase in the company's sales four new employees were hired in January of 2003 in the position of sales representative. It is noted that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). As the petitioner's sales representatives were not a part of the organizational structure when the petition was filed in December of 2002, they cannot be taken into account for the purpose of determining the beneficiary's eligibility for the extension of stay.

Furthermore, even though the list of job duties submitted on appeal suggests that the beneficiary is relieved of having to perform non-qualifying job duties, there is no indication that this was the case at the time the petition was filed when the beneficiary had a total of three subordinate employees. While the size of the petitioner should not be the determining factor in deciding a beneficiary's eligibility for the L-1A visa classification, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size and the absence of employees who would perform the non-managerial or non-executive operations of the company. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The petitioner's initial description of the beneficiary's job duties suggests that the beneficiary directs the overall organization and focuses on policy-making. However, the beneficiary did not have a sufficient support staff to refrain from performing primarily non-qualifying duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). While it is true that the beneficiary's job description is key in determining whether he performs primarily qualifying duties, that description must be considered in light of the petitioner's overall organizational structure. In the instant case, at the time the petition was filed, the petitioner's organizational structure had not reached a level of complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies could have realistically constituted significant components of the duties performed on a day-to-day basis.

On review, the record does not establish that a majority of the beneficiary's duties would be primarily directing the management of the organization. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or that he will be relieved from having to perform non-qualifying duties. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization or that he operates at a senior level within an organizational hierarchy. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the record does not contain sufficient evidence to establish that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the year prior to filing the petition to extend the beneficiary's authorized employment. See 8 C.F.R. § 214.2(l)(14)(ii)(B). While the petitioner submitted a number of its bank statements and purchase and sales invoices, none of the documents are dated prior to June of 2002. Therefore, the record lacks evidence that the petitioner was doing business from December of 2001, the date the initial petition was approved, to May of 2002. It is noted that an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9

(2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). As such, due to the additional grounds discussed in this paragraph, this petition cannot be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.